not, he says, until a case is fixed for trial on a specified date that counsel proceed to get it up in detail. He allowed $200 for instructions for defence. The ordinary fee is $6/-

I have consulted with my brother Terrell and he informs me that the regular practice in Penang is as stated by the Registrar.

The Registrar in this case, therefore, exercised his discretion under section 1312 of the Civil Procedure Code in allowing a higher fee for "Instructions for the Defence" than he otherwise would have done; and this extra fee, in his opinion, compensated Mr. Page for the special efforts which he has detailed in the Bill and in his objections.

This would seem to close the matter, but it appears that section 1301 of the Code has not been considered in the taxation probably because it was not put forward by Mr. Page.

Section 1301 is as follows:—

> "As to evidence such just and reasonable charge and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses shall be allowed, if not charged and allowed for under the general fee No. 79 in Schedule C."

This section appears to contemplate a trial, for the attendance of witnesses is mentioned but it must, I think, include cases where there is no trial. Its provisions correspond to R.S.C. Order 65 r. 27 (29)—Annual Practice p. 1459. That Regulation provides that "all such costs, charges and expenses as shall appear to him to have been necessary or proper for defending the rights of any party shall be allowed. Now under this Regulation it was held in *Windham* v. *Bainton* (1888) 21 Q.B.D. 199 that costs of procuring evidence may be allowed even if there has been no notice of trial. But if a party wishes to proceed under section 1301 (or Order 65 r. 27 (29) he must, according to the ruling of Swinfen Eady L.J. in *Slingsby* v. *The Attorney-General* (1918) 119 L.T. 104 state "the length of the documents perused, the names of the witnesses who have attended, the places to which journeys have been made, with the time occupied in each, and the amount of the travelling expenses."

It is possible that the Registrar may wish to re-consider his taxation in view of section 1301 and the cases I have cited, and I remit this case back to him to consider that point. If he adheres to his previous decision, the taxation is reduced to a question of *quantum* from which any further appeal would be very difficult.

Solicitors for the Defendants—

Allen & Gledhill.

[APPELLATE CIVIL JURISDICTION]

TAN HONG TEE & CO.

vs.

P. & O. BANKING CORPORATION LTD.

[SINGAPORE SUIT No. 329 OF 1931]

[SINGAPORE APPEAL No. 3 OF 1932]

Contract—deposit of title deeds—payment to redeem—want of mutuality—failure of consideration—non-performance of condition—recovery of money paid under mistake.

Where the plaintiffs paid money to the defendants with a view to getting back certain title deeds deposited with the latter by a third party without the authority of the plaintiffs, and the defendants misunderstood the purpose for which the payment was made.

Held, (reversing the Judgment of Sproule, J.), that as there was no mutual agreement between the parties and hence no contract, the plaintiffs were entitled to recover the money paid by them under a mistake of fact.

This was a claim by the Plaintiffs against the defendants for the return of certain title deeds of land at Chua Chu Kang Road belonging to one of the partners of the plaintiff firm. The title deeds in question were originally deposited by the Plaintiffs with Rose, Macphail & Penman Ltd. who subsequently deposited them with the defendants as security on their account without the authority of the plaintiffs. Under protest the plaintiffs gave special authority in writing for the deposit of the the deeds with the defendants. Later the defendants by their accountant agreed to return the deeds to the Plaintiffs upon their payment of $5,000 against the account of Rose, Macphail & Penman Ltd. On the 25th July the plaintiffs duly paid the sum of $5,000 to the defendants but failed to recover the title deeds. The full facts appear by the Judgment of Murison, C. J.

This action was tried before Sproule, J. on the 25th November 1931 and on the 30th

November 1931 Judgment was given in favour of the defendants.

The plaintiffs appealed to the Court of Appeal. The Appeal was heard by Murison C. J. Terrell, J. and Burton, J.

Williamson, Braga with him for the plaintiffs.—(Appellants).

Smith, for the Defendants.—(Respondents).

Cur. Ad. Vult.

MURISON, C.J. This is an appeal against the judgment of Mr. Justice Sproule.

The Plaintiffs are share and produce brokers and the Defendants are Bankers both carrying on business in Singapore.

The Plaintiffs had dealings with Rose Macphail & Penman Ltd. Rubber Brokers during the year 1930 the transactions between them being the purchase and sale of rubber commodity and rubber shares.

As security for their account the Plaintiffs deposited with Rose Macphail & Penman Ltd. certain title deeds of land at Chua Chu Kang belonging to one of the partners of the Plaintiff firm.

About the month of July 1930 the Plaintiffs discovered that Rose Macphail & Penman Ltd. had deposited the said title deeds with the Defendants as security on their account with the Defendants without the consent or authority of the Plaintiffs.

Upon the protest of the Plaintiffs and after discussion the Plaintiffs gave special authority in writing for the deposit of the title deeds with the Defendants by Rose Macphail & Penman Ltd.

The Plaintiffs then claimed that on or about 23rd July, 1930 the Defendants' accountant agreed to return the title deeds to the Plaintiffs upon payment of $5,000 by the Plaintiffs against the account of Rose Macphail & Penman Ltd. with the Defendants.

On the 25th July, 1930 the Plaintiffs accordingly paid the sum of $5,000 and Defendants received such sum of money.

The Plaintiffs then claimed, in effect, either the return of the title deeds or the return of the $5,000.

The Defendants in their Defence deny that the Defendants' accountant or anyone else agreed to the return of the title deeds to the Plaintiffs upon payment of $5,000 by the Plaintiffs. They say that the $5,000 was deposited for purposes entirely independent of the title deeds. What these purposes were they do not say, but it will appear later what they actually mean.

The essential point in the case is the purpose for which the $5,000 in dispute was deposited with the Defendants.

The evidence shows, as the Statement of Claim says, that the Plaintiffs had dealings in rubber with Messrs. Rose Macphail & Penman, and that with the eventual consent of the Plaintiffs Rose Macphail & Penman had deposited certain title deeds of the Plaintiffs with the Bank as security for Rose Macphail & Penman's overdraft with the Bank.

For reasons which are immaterial the Plaintiffs and Defendants agreed that a cash payment should be substituted for the title deeds.

This agreement goes to the root of the case. It was made by one Nassim, Plaintiffs' manager with the Bank's representative one Gardner. The Plaintiffs' manager understood that upon deposit of $5,000 in cash with the Bank to the credit of Rose Macphail & Penman the Bank would return the title deeds to the Plaintiffs.

It is essential to observe here that the (supposed) contract was concluded between the Plaintiffs and the Defendants. The firm of Rose Macphail & Penman were in a way parties to the contract, but only in the sense that the principals, the Plaintiffs and Defendants were making a contract upon a matter which concerned the financial position of Rose Macphail & Penman & Company. The Plaintiffs wanted to bolster up that firm's credit. The Bank wanted security for their overdraft to Rose Macphail, Penman & Company. It is only in that sense that Rose Macphail, Penman & Company were ever concerned in the transaction between the Plaintiffs and the Defendants. They were not really parties to the contract at all.

Eventually the Plaintiffs deposited $5,000 with the Defendants believing that in return the title deeds would be returned to them. But it appeared that there had been some mistake. The Bank wanted "something like $10,000" as Mr.

Penman says before they returned the title deeds. And so the contract in the end was no contract at all. The Bank kept the $5,000 and the title deeds too. Hence the action by the Plaintiffs for the return either of their money or their title deeds. The claim was based upon failure of consideration.

Before us Mr. Smith for the Bank argued that there had been no total failure of consideration which would entitle the Plaintiffs to recover either their money or their deeds. The failure he said was partial because there were three considerations for the advance other than the return of the deeds.

The first of these was, he said, that the Bank obtained further security for their rubber dealings with Rose Macphail, Penman & Company. That may be so. But the contract was between the Plaintiffs and the Defendants. The return of the title deeds was the essential. It was an accident that the Defendants got additional security in their dealings with a third party, namely Rose Macphail, Penman & Company. Nor did any consideration move from Rose Macphail, Penman & Company to the Bank.

The second argument is that the Bank, on payment of the $5,000, forbore or might have foreborne to close down on Rose Macphail, Penman & Company. That was another accidental result of the payment. There was no contract between Rose Macphail, Penman & Company and the Bank that any such forbearance was to be exercised. The plain contract was between the Plaintiffs and the Bank. Forbearance to sue was a side issue which might or might not happen as a consequence of the contract.

The third argument is that with the additional credit of $5,000 the Bank wrote down Rose Macphail, Penman & Company's overdraft by $5,000. But the same remarks apply to this point. Such writing down was an incidental result of the contract.

The main and substantial purpose of the contract, as the evidence shows, was to secure the return of the title deeds. Only Nassim and Gardner—the Bank accountant were present at the making of the contract. The trial judge who heard the witnesses entirely discredited Gardner, and this Court is consequently placed in the position that it cannot attach any weight whatever to his evidence. Nassim, the Plaintiffs' manager says that the payment of the $5,000 was substitutional for the title deeds. Asked if it was made as a rubber deposit he said "yes and no"—and explained that cryptic statement by saying that the title deeds had originally been made against rubber dealings.

It is quite clear in my opinion that the real and substantial reason for the deposit of the $5,000 was for the return of the title deeds. Even if a secondary reason was to strengthen the position of Rose Macphail, Penman & Company against their overdraft it must be remembered that it was only a matter of $5,000 against an account which ran into a deficit of over $200,000. If any consideration existed there it was of an exceedingly small character, and is of much less consequence than the consideration which was disregared in a similar case of failure of consideration in *Ferns* v. *Carr* (1885) 28 C.D. 409.

In my opinion, as the contract was null and void, there was a failure of consideration either total or substantial enough to be considered as total.

The Plaintiffs, therefore, the Appellants, are entitled to the return of their money. (See Addison on Contract 11th edition page 136, Chitty on Contracts 18th edition page 65 and *Wright* v. *Newton* (1835) 150 Engl. Rep. 53).

I would allow the appeal and order the Respondents to pay the Appellants the $5,000 claimed by them and their costs both here and below.

BURTON, J. I agree that the appeal should be allowed with costs.

According to Sproule J's judgment the parties agreed:—

(1) that the plaintiffs' title deeds should be pledged to the Bank as additional security against Rose Macphail & Penman's overdraft;

(2) that cash should be substituted for the title deeds; and

(3) that when cash was received the Bank should return the title deeds to the plaintiffs. But Sproule J. also held that the sum of cash necessary was not agreed. There is no appeal against these

findings; and the appellants' case is that on these findings the parties not being *ad idem* as to the amount of money necessary to redeem, they are entitled to a refund of the money paid.

Now on 25th July 1930 the plaintiffs paid $5,000 by cheque to Rose Macphail & Penman, which was endorsed at once to the Bank, and on the same day Penman on behalf of the firm of Rose, Macphail & Penman wrote to the Accountant of the P. & O. Bank,

> "Will you please deliver to the representative of Messrs. Tan Hong Tee & Co. the title deeds left with you of property at Chua Chu Kang Road, Singapore."

It is obvious therefore that the $5,000 was paid to redeem the deeds; and Sproule J. finds that the Bank was bound to treat the $5,000 not as additional, but as substitutional security for Rose Macphail & Penman's debt in place of Plaintiffs' title deeds.

What in fact the Bank did was to keep the $5,000 and the title deeds. But the $5,000 was paid in pursuance of an inchoate agreement to redeem title deeds, the exact terms of which were never fixed between the parties. It would appear therefore *prima facie* that the appellants' plea is right, that the consideration failed for the $5,000, and that that sum must be refunded.

But to contest the proposition Mr. Smith argued that the consideration only partially failed, and that partial failure does not entitle the plaintiffs to a refund. He bases this argument on three grounds; the first is that in exchange for the $5,000 the appellants got a security for their rubber dealings with Rose Macphail & Penman to whom the cheque was paid.

There is no evidence that the appellants were necessarily any better off on this score. The titles already provided cover for the rubber dealings with Rose Macphail & Penman, and the agreement was to substitute money for the titles, not to increase the security; the payment did not in my view act as a consideration for increased credit in rubber dealings, it was merely substitutional; but even if I am wrong in that it is clear that this consideration moved between plaintiffs and Rose Macphail & Penman, and not to the Bank at all.

Mr. Smith's second ground was that they paid the money to prevent the Bank foreclosing on Rose Macphail & Penman, and in consideration of this payment the Bank forbore to request immediate payment of Rose Macphail & Penman's overdraft.

I think the answer to this is that the consideration for the new contract was twofold, firstly as between Rose Macphail & Penman and plaintiffs to provide cover for rubber dealings, and secondly as between the Bank and plaintiffs to redeem the deeds. But the forebearance (if any) moved from the Bank to Rose Macphail & Penman, and was external to the contract; and apart from that I can find no evidence that the Bank did in fact exercise any forebearance.

Mr. Smith's third ground was that the deeds were under mortgage by appellants to the Respondents to secure Rose Macphail & Penman's overdraft; their overdraft was reduced *pro tanto* and the deeds remain security for the diminished balance. In other words the Bank appropriated the $5,000 and still retain the deeds as security. But again *ex hypothesi* that was contrary to the agreement which was to substitute. The $5,000 was substitutional and not additional, and the Bank have no right to treat it as additional.

Mr. Smith then argued that even if the consideration had failed, the money should not be restored as the parties cannot be restored to the *status quo*. But the answer to this contention is that the Bank never had any right to retain the $5,000 and the securities as well. They knew the purpose for which the $5,000 was paid, that it was substitutional security for the deeds. But they treated it as additional, and the Bank's action in retaining both money and deeds is the immediate cause of this action.

TERRELL, J. Plaintiffs on 21st July 1931 paid $5,000 which was credited to Rose Macphail & Penman Ltd. at defendant Bank. Plaintiffs say it was by arrangement with Mr. Gardner the accountant of the Bank, that the cheque was made in favour of Rose Macphail & Penman and that they were to get their title deeds back on payment of this $5,000.

The learned trial judge did not accept Mr. Gardner's evidence and accordingly there was evidence on which he could have found that there was a definite agreement, partly performed by the plaintiffs that on payment of $5,000 the title deeds should be returned. He found, however, that the parties were not *ad idem*. He certainly did not find and could not have found on the evidence that there was an agreement that the title deeds should be returned on payment of $10,000 or any other sum.

The result was that the plaintiffs paid $5,000 thinking that there was an agreement that they would have their title deeds back. As the learned trial judge has found that there was in fact no such agreement on the defendants' part, it follows that the $5,000 was paid under a mistake of fact and should be returned.

The respondents' argument was that there was only a partial failure of consideration and that there was enough consideration left to support their claim to keep the $5,000.

The contract alleged by the plaintiffs, but not proved, was that the consideration was the return of the title deeds and nothing else is alleged in the pleadings. Mr. Smith alleged three other considerations:—

(1) The $5,000 was paid to Rose Macphail & Penman Ltd. as a deposit on rubber contracts.

(2) As a result of the payment the Bank exercised forbearance towards Rose Macphail & Penman Ltd.

(3) The amount with which the deeds were chargeable, roughly $200,000, was reduced by $5,000.

Now it is quite clear that numbers (1) and (3) are quite irrelevant. They may possibly have been reasons which contributed towards the plaintiffs' decision to pay the $5,000, just as a man buying a motor car may have in mind that he can use his car for taking a sick friend for a ride. But such considerations are quite irrelevant to the contract itself because they do not move from the Promisee, in this case the Bank.

As regards (2), if it had been alleged in the defence and proved that on payment of the $5,000 the Bank had agreed to give Rose Macphail & Penman time, that would I think have been a answer. But the pleadings and the facts as proved and found by the learned Judge do not support any such contention. It is not enough to find that one of the plaintiffs' objects in paying the $5,000 was to assist Rose Macphail & Penman Ltd. It must be proved that the Bank in fact agreed to give Rose Macphail & Penman time and there is no suggestion of any such stipulation in either Nassim's or Gardner's evidence. To put it another way—suppose the day after the payment of the cheque, July 25th 1931, the Bank had closed down on Rose Macphail & Penman Ltd., could the latter firm or the plaintiffs have set up a breach of a contract to give time? Clearly not—and that disposes of the suggestion that the giving of time was part of the consideration for the payment of the $5,000.

It is I think important not to confuse the circumstance under which the deeds were deposited and by arrangement made available for securing Rose Macphail & Penman's overdraft, with the contract the failure of which is now alleged. The suggested arrangement for the return of the title deeds on payment of a sum of money was an entirely separate transaction and is the only transaction which was before the Court. The only consideration for the payment of the money was the return of the title deeds—as the amount of the agreed payment was in dispute the title deeds were retained, and the only consideratiion for the payment that was made failed.

Mr. Smith also argued that owing to the Bank's forbearance the parties cannot now be placed in the same position. The answer to that is that when the Bank refused to accept the agreement for the return of the title deeds alleged by the plaintiffs they should have returned the $5,000 at once. If their position was subsequently altered for the worse no one is to blame except the Bank.

I would therefore allow the appeal and direct payment by the respondents to the appellants of $5,000 with costs here and below.

Appeal Allowed.

Solicitor for the Appellants—

Claude da Silva.

Solicitors for the Respondents—

Donaldson & Burkinshaw.